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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *Petitioner,*

vs.

SUSAN DWIGHT BLISS

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

JAMES McKINLEY ROSE,
Counsel for Respondent.

R. L. VON BERNUTH,
J. F. BOYER,
Of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1933.

No. 887

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,
vs.
SUSAN DWIGHT BLISS.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

This brief is in opposition to the petition of the Commissioner of Internal Revenue for a Writ of Certiorari to review the judgment of the Circuit Court of Appeals for the Second Circuit (R. 31) entered in the above cause on January 15, 1934, which reversed a decision of the Board of Tax Appeals.

Opinions Below.

The Findings of Fact (R. 16, 17) and opinion (R. 18-20) of the Board of Tax Appeals, promulgated December 2, 1932, are reported in 27 B. T. A. 205. The opinions of the Circuit Court of Appeals for the Second Circuit (R. 26-31) is reported in 68 Fed. 2nd 890.

Question Presented.

The facts involved in the case are sufficiently stated by the Solicitor General on pages 2 and 3 of his petition. One question only was presented to the Court below for its

opinion, the decision on which is the subject of this petition for review:

Does a taxpayer's "net income", upon which is based the 15% limitation of deductions for charitable contributions allowed by Section 23-n of the Revenue Act of 1928, include capital net gains if the taxpayer has elected to be taxed thereon under the provisions of Section 101 of said Act.

Statutes Involved.

The pertinent provisions of the Revenue Act of 1928 are set forth in the Appendix, infra, pages 5-8. These include Sections 21 and 22 of that Act, which are omitted from the petition and appendix thereto.

ARGUMENT.

POINT I.

There is no necessity for a review by this Court of the question here presented since the statutes involved have been correctly interpreted by the Courts and the Board of Tax Appeals.

Gross income as defined by Section 22 of the Revenue Act of 1928 includes capital gains. Under Section 21 of that Act net income is defined as gross income less certain deductions specified in Section 23. One of these deductions is for charitable contributions to the extent of 15% of the net income of the taxpayer computed without allowance for the deduction of charitable contributions. These three sections determine the net income of the taxpayer for all purposes of the Act.

Nothing in the 1928 Act or in Section 101 thereof alters the definition of "net income" for any purpose. When the net income has been determined in accordance with Sections 21, 22 and 23 of the Act, the taxpayer, by Section 101 of the Act, is given an option of having that part of the net income

which is derived from capital net gain taxed at a flat rate of 12½%, and for this purpose only Section 101 directs a separation of "net income" into "ordinary net income" and "capital net gain".

This is the construction placed upon these sections by the four courts which have passed upon the question,* including the Circuit Courts of Appeals in the First and Second Circuits; this is the construction adopted and followed by the Commissioner of Internal Revenue under the provisions of the 1921, 1924, 1926 and 1928 Acts prior to the decision of the Board of Tax Appeals in 1931 in *Elkins* v. *Commissioner,* 24 B. T. A. 572, involving capital net loss; and this is the construction followed by the Board of Tax Appeals since its decision in 1933, in *Straus* v. *Commissioner,* 27 B. T. A. 1116, in which the Board, acting as a whole, overruled the prior decisions of individual members of the board in the case at bar, in *Colgate* v. *Commissioner,*** 27 B. T. A. 506 and in *Harbison* v. *Commissioner,*** 26 B. T. A. 896, each of which involved capital net gains.

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* In addition to the case at bar and *Helvering* v. *Harbison,* No. 888, October Term 1933, and *Helvering* v. *Colgate,* No. 889, October Term 1933, in which petitions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit have been filed simultaneously, the following court decisions have been rendered or are pending:

White v. *Atkins,* C. C. A. 1st, decided March 14, 1934, affirming *Atkins* v. *White,* D. Mass. 3 Fed. Supp. 694;

Blow v. *U. S.,* (N. D. Ill.) 5 Fed. Supp. 737, pending before argument on appeal to the Circuit Court of Appeals for the Seventh Circuit;

Straus v. *Commissioner,* 27 BTA 1116, pending after argument on petition for review in the Court of Appeals of the District of Columbia;

Robinette v. *Commissioner,* 27 BTA 1426, pending after argument on petition for review in the Circuit Court of Appeals for the Third Circuit;

Igleheart v. *Commissioner,* 27 BTA 1426, pending after argument on petition for review in the Circuit Court of Appeals for the Seventh Circuit.

** *Colgate* v. *Commissioner.* Decision of BTA reversed, January 8, 1934, by the Circuit Court of Appeals, Second Circuit, on the decision in *Bliss* v. *Commissioner,* not yet reported.

Harbison v. *Commissioner.* Decision of BTA reversed, January 8, 1934, by the Circuit Court of Appeals, Second Circuit, 68 Fed. 2nd 1004.

The majority opinion of the Circuit Court of Appeals in the case at bar (R., 26-29) contains a history of the Revenue Acts and the decisions thereunder and the reasoning applicable to the construction of the statute.

At present there is no decision involving capital net gain in conflict with that in the case at bar. The Commissioner of Internal Revenue alone refuses to accept the construction adopted by the courts and the Board of Tax Appeals. The Commissioner argues that the decision of the Circuit Court of Appeals for the Fifth Circuit in *Westfeldt* v. *Commissioner*, 63 Fed. 2d 882, is contrary in principle to the cases above set forth. That case, however, has no application to that at bar as the question there involved was the treatment of income derived from a partnership (Section 207 (b) Revenue Act of 1924), and the effect of the decision was merely to place such income on a parity with other income of the taxpayer with respect to capital net loss for purposes of computing the tax.

We submit that the reading of Sections 21 and 22 together with Sections 23 and 101 (a) and (c) 1, 3 and 7, will demonstrate that the correct interpretation has been placed upon the statute by the Courts below, and that the decision of this case does not involve "an important question of Federal law which has not been, but should be, settled by this court".

POINT II.

The petition for writ of certiorari should be denied.

Respectfully submitted,

JAMES McKINLEY ROSE,
Counsel for Respondent.

R. L. von Bernuth,
J. F. Boyer,
Of Counsel.

APPENDIX.

REVENUE ACT OF 1928, Chap. 852, 45 STAT. 797, 799, 811.

Sec. 21. NET INCOME. "Net income" means the gross income computed under section 22, less the deductions allowed by section 23.

Sec. 22. GROSS INCOME. (a) *General Definition*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.

* * * * * *

Sec. 23. DEDUCTIONS FROM GROSS INCOME. In computing net income there shall be allowed as deductions:

* * * * * *

(n) *Charitable and Other Contributions.* In the case of an individual, contributions or gifts made within the taxable year to or for the use of:

* * * * * *

(2) any corporation, or trust, or community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual;

* * * * * *

to an amount which in all the above cases combined does not exceed 15 per centum of the taxpayer's net income as computed without the benefit of this subsection. Such contributions or gifts shall be allowable as deductions only if

verified under rules and regulations prescribed by the Commissioner, with the approval of the Secretary.

Sec. 101. CAPITAL NET GAINS AND LOSSES.

(a) *Tax in Case of Capital Net Gain.* In the case of any taxpayer, other than a corporation, who for any taxable year derives a capital net gain (as hereinafter defined in this section), there shall, at the election of the taxpayer, be levied, collected, and paid, in lieu of all other taxes imposed by this title, a tax determined as follows: a partial tax shall first be computed upon the basis of the ordinary net income at the rates and in the manner as if this section had not been enacted and the total tax shall be this amount plus 12½ per centum of the capital net gain.

(b) *Tax in Case of Capital Net Loss.* In the case of any taxpayer, other than a corporation, who for any taxable year sustains a capital net loss (as hereinafter defined in this section), there shall be levied, collected, and paid, in lieu of all other taxes imposed by this title, a tax determined as follows: a partial tax shall first be computed upon the basis of the ordinary net income at the rates and in the manner as if this section had not been enacted, and the total tax shall be this amount minus 12½ per centum of the capital net loss; but in no case shall the tax of a taxpayer who has sustained a capital net loss be less than the tax computed without regard to the provisions of this section.

(c) *Definitions.* For the purposes of this title—

(1) "Capital gain" means taxable gain from the sale or exchange of capital assets consummated after December 31, 1921.

(2) "Capital loss" means deductible loss resulting from the sale or exchange of capital assets.

(3) "Capital deductions" means such deductions as are allowed by section 23 for the purpose of computing net

income, and are properly allocable to or chargeable against capital assets sold or exchanged during the taxable year.

(4) "Ordinary deductions" means the deductions allowed by section 23 other than capital losses and capital deductions.

(5) "Capital net gain" means the excess of the total amount of capital gain over the sum of (A) the capital deductions and capital losses, plus (B) the amount, if any, by which the ordinary deductions exceed the gross income computed without including capital gains.

(6) "Capital net loss" means the excess of the sum of the capital losses plus the capital deductions over the total amount of capital gain.

(7) "Ordinary net income" means the net income, computed in accordance with the provisions of this title, after excluding all items of capital gain, capital loss, and capital deductions.

(8) "Capital assets" means property held by the taxpayer for more than two years (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale in the course of his trade or business. For the purposes of this definition—

> (A) In determining the period for which the taxpayer has held property received on an exchange there shall be included the period for which he held the property exchanged, if under the provisions of section 113, the property received has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as the property exchanged.

(B) In determining the period for which the taxpayer has held property however acquired there shall be included the period for which such property was held by any other person, if under the provisions of section 113, such property has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as it would have in the hands of such other person.

(C) In determining the period for which the taxpayer has held stock or securities received upon a distribution where no gain is recognized to the distributee under the provisions of section 112 (g) of this title or under the provisions of section 203 (c) of the Revenue Act of 1924 or 1926, there shall be included the period for which he held the stock or securities in the distributing corporation prior to the receipt of the stock or securities upon such distribution.

(d) *Collection and Payment of Tax.* The total tax determined under subsection (a) or (b) shall be collected and paid in the same manner, at the same time, and subject to the same provisions of law, including penalties, as other taxes under this title.